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No. 83-1752

In The

Supreme Court of the United States

October Term, 1983

HERBERT H. HUMPHREY, III, Attorney General of
the State of Minnesota; MINNESOTA PUBLIC
UTILITIES COMMISSION; and MINNESOTA
DEPARTMENT OF PUBLIC SERVICE,
Petitioners,

v.

NORTHERN STATES POWER COMPANY,
and MINNESOTA PUBLIC INTEREST
RESEARCH GROUP,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court
of the State of Minnesota

**BRIEF OF THE COMMONWEALTH OF VIRGINIA
AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

COMMONWEALTH OF VIRGINIA

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This brief as *amicus curiae* is filed by the Commonwealth of Virginia pursuant to Rule 36.4 of the Rules of this Court. The Commonwealth respectfully requests the Court to grant the Petition for Certiorari.

INTEREST OF AMICUS CURIAE

A very large majority of the retail electric service available in Virginia is provided by Appalachian Power Company (APCO) and Virginia Electric and Power Company

(VEPCO). Substantial numbers of Virginia's citizens are retail customers of these utility companies. Currently, retail rates for electric service to these citizens are set by the Virginia State Corporation Commission.

Both VEPCO and APCO are wholly-owned subsidiaries of holding companies. APCO is a subsidiary of American Electric Power Company, Inc. (AEP), and VEPCO is owned by Dominion Resources, Inc. Each of them is regulated by several state jurisdictions and the Federal Energy Regulatory Commission (FERC).¹

Virginia customers have a unique and immediate interest in this case. VEPCO has suggested that its parent, Dominion Resources, Inc., may create a separate subsidiary to own electric generating facilities which would in turn sell power at wholesale to VEPCO. The resulting corporate structure would be very similar to the Northern States Power Company corporate structure at issue here. The Virginia State Corporation Commission has already begun an investigation to determine whether a separate generating subsidiary is in the public interest. *Commonwealth of Virginia, ex. rel State Corporation Commission, Ex Parte, in re: Investigation of corporate reorganization of Virginia Electric and Power Company*, Case No. PUE830060.

The retail customers of electric utilities have long relied on a delicate balance between Federal and State jurisdiction to set their electric rates.² The consequences of a shift in the Federal-State balance can significantly affect the utility bills paid by retail customers, perhaps requiring them to shoulder hundreds of millions of dollars of additional expense even

¹ VEPCO serves North Carolina and West Virginia as well as Virginia. APCO serves both Virginia and West Virginia.

² The Attorney General of Virginia represents utility customers in rate cases pursuant to § 2.1-133.1 of the Code of Virginia. VA. CODE, § 2.1-133.1 (repl. vol. 1979).

where the utility serving them has undertaken no obligation on their behalf. *See, Middle South Energy, Inc.*, FERC Docket No. ER82-616-000, Initial Decision Concerning Sales of Power From the Grand Gulf Nuclear Generating Plant, 26 FERC Rep. [CCH Fed. En. Guidelines] ¶ 63,044 at 65,093 (February 3, 1984). The Commonwealth submits this brief on behalf of the interests of its citizens as consumers of electric energy at retail.

ARGUMENT

State regulation of retail electric rates is pervasive and well-settled. Electric utilities have been regulated in Virginia since the early part of this century. Shannon, *The Evolution of Virginia's State Corporation Commission*, 14 Wm. & Mary L. Rev. 523, 534-35 (1973). Under the Federal Constitution, however, even the States' pervasive regulatory authority does not reach all aspects of electric utility ratemaking. *Public Utilities Comm'n v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927). As a result Congress passed the Federal Power Act in 1935 (16 U.S.C. § 824 et. seq.), tailored to regulate wholesale electric rates in interstate commerce and close the so-called "Attleboro Gap." *See*, 2 A.J.G. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 523-24 (1969). Thus, the Federal Act was intended to supplement state jurisdiction, not supplant it.

The Federal Power Act was plainly not intended to preempt state jurisdiction over retail rates or to allow unlimited forum shopping between the FERC and state commissions. Yet those are the inevitable results of decisions like the case at bar, particularly where a public utility holding company is involved. Mere changes in corporate structure could cause massive shifts in jurisdiction without any substantive change in the manner in which the utility system is operated.

Under the Minnesota Supreme Court's rationale, to oust State jurisdiction the utility could simply divide itself in two, one half owning generating facilities and the other half owning distribution facilities. The halves of the former whole could then purportedly engage in wholesale sales of power subject to Federal jurisdiction. The State's authority would become a mere form because of the degree to which the distribution company's power costs, and therefore retail rates, would already be determined by pre-emptive wholesale rates. The Federal Power Act cannot be fairly read to intend such a complete elimination of effective State regulation of retail rates.

Nor can the act be read to permit unlimited forum shopping between Federal and State commissions, but the result in this case would allow it. Any utility could reverse the structure described above to subject itself to greater state jurisdiction if it judged state regulation to be more advantageous to it. The "bright-line" drawn by the Federal Power Act³ between wholesale and retail sales is functionally related. It should not be susceptible of manipulation by mere changes in corporate organization without real changes in the functional operation of the business.

³ *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964).

CONCLUSION

The case at bar is not an isolated occurrence of significance only to the parties. It is broad in effect and threatens to undermine the appropriate enforcement of the Federal Power Act and long-established State regulatory systems. For these reasons, the Commonwealth of Virginia urges the Court to grant the Petition for Certiorari and set this case for full briefing and argument.

Dated: May 25, 1984

Respectfully submitted,

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